SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 491

CORLISS LAMONT, DOING BUSINESS AS BASIC PAMPHLETS, APPELLANT,

vs.

POSTMASTER GENERAL OF THE UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 23, 1964

[fol. 1] [File endorsement omitted].

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

BASIC PAMPHLETS, Plaintiff,

—against—

THE POSTMASTER-GENERAL OF THE UNITED STATES, Defendant.

AMENDED COMPLAINT—Filed December 3, 1963

Plaintiff, by its attorneys, complaining of the defendant, The Postmaster-General of the United States, for its amended complaint, alleges:

1. This Court has jurisdiction under Article III, § 2 of the United States Constitution, under 28 U.S.C. 1331, 1339, 1356, 2201-2202, 2282 and 2284, and under § 10 of the Administrative Procedure Act 5 U.S.C. § 1009. The matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs.

2. One of the purposes of this action is to enjoin the enforcement, operation and execution of an Act of Congress for repugnance to the Constitution. Hence, a three-judge Court is required to be convened under 28 U.S.C. §§ 2282, 2284.

3. Plaintiff is engaged in the business of publishing and distributing pamphlets and other literature on subjects of public interest, such as civil liberties, foreign relations, philosophy, and war and peace; plaintiff maintains his office in the City of New York.

4. The defendant is The Postmaster-General of the United States.

[fol. 2] 5. In connection with its work Basic Pamphlets receives publications sent to it from various places through-

out the United States and throughout the world, including England, France, Poland, The Soviet Union and China. The receipt of such publications is necessary to the effective publishing operations of the plaintiff since they constitute important sources of information for the plaintiff and are the subject of comments made by the plaintiff in its publications. It is important for the plaintiff to know what is written and said in other countries of the world in order effectively to comment upon those subjects.

6. Upon information and belief, the defendant has heretofore received from countries abroad for transmittal to the plaintiff, various unsealed mail addressed to the plaintiff bearing prepaid postage. The defendant, acting pursuant to 39 U.S.C. 4008, 76 Stat. 840 (hereinafter called "the statute") retained the said mail instead of delivering it to the plaintiff and notified the plaintiff that the Secretary of the Treasury "has determined this mail to be Communist political propaganda" and that the defendant would destroy it unless plaintiff formally requests in writing that such "Communist political propaganda" be delivered.

7. Upon information and belief, defendant, acting pursuant to 39 U.S.C. 4008, has set up various screening centers throughout the United States to examine mailed matter to determine whether it is "Communist political propaganda" within the provisions of that statute, and to forward through the mails such mailed matter determined to be within the provisions of that statute to addressees who have notified defendant of their desire to receive such mailed matter.

[fol. 3] 8. Upon information and belief, defendant has compiled lists or other records containing the names of persons who desire to receive mailed matter determined to be "Communist political propaganda", and has made such names available to other agencies of the Executive Branch of the United States Government and to committees of the Congress, including the Committee on Un-American Activities of the House of Representatives, and that such names have become, or may at some future time, become available to the public.

9. Plaintiff has declined to express a desire to defendant that plaintiff receive mailed matter determined by defendant to be "Communist political propaganda" on the ground that the said statute is unconstitutional and on the further ground that plaintiff does not wish to be included in any governmental list or record of persons desiring to receive "Communist political propaganda".

10. On August 13, 1963 plaintiff commenced this action by filing the original complaint herein.

11. Thereafter, by letter dated August 30, 1963, the Acting General Counsel of the Post Office Department advised plaintiff that the original complaint herein constituted a request within the meaning of the statute by plaintiff to receive "Communist political propaganda", and that postmasters at all foreign propaganda screening points were being advised not to detain mail addressed to plaintiff. A copy of that letter is annexed hereto as Exhibit A and made a part hereof.

12. Upon information and belief, defendant has added plaintiff's name to lists and records of persons desiring to receive "Communist political propaganda" and has distributed such list and records, containing plaintiff's name, as hereinabove alleged.

[fol. 4] 13. The statute is unconstitutional and void upon its face and as applied because:

a. it violates plaintiff's right to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution;

b. it violates the due process clause of the Fifth Amendment to the United States Constitution in that it is vague, indefinite and uncertain and fails to provide adequate or any procedural safeguards for making the determination as to what is "Communist political propaganda", assuming such a determination can ever be made;

c. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit:

persons desiring to receive Communist political propaganda, and impliedly stigmatizing members of that class and holding them up to opprobrium;

d. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit: officials of United States Government agencies, public libraries, colleges, universities, graduate schools and scientific or professional institutions for advanced studies, which class is exempt from the provision of the statute, with the result that persons in the position of plaintiff are discriminated against.

[fol. 5] 14. Plaintiff has no adequate remedy at law, he will be required to resort to a multiplicity of actions and will suffer irreparable injury unless the relief prayed for is granted.

Wherefore, plaintiff prays that:

1. Jurisdiction be taken by a three-judge Court pursuant to 28 U.S.C. §§ 2282, 2284;

2. The Court, in pursuance of its jurisdiction under 28 U.S.C. § 2282, issue a preliminary injunction and a permanent injunction enjoining the defendant, his successors and subordinates, from carrying out or enforcing 39 U.S.C. 4008 on the ground that it is unconstitutional, and directing defendant to remove plaintiff's name from all lists and records he maintains of persons desiring to receive "Communist political propaganda"; and not to place plaintiff's name upon such a list;

3. The Court render a declaratory judgment that the plaintiff is entitled to receive mail from abroad without complying with 39 U.S.C. 4008 or the defendant's directive thereunder, and that 39 U.S.C. 4008 is unconstitutional on its face and as applied; and

4. The Court grant such other and further relief as may be just and proper in the premises.

Rabinowitz & Boudin, by Leonard B. Boudin, Member of the firm, Office & P.O. Address, 30 East 42nd Street, New York 17, New York.

[fol. 6]

EXHIBIT A TO AMENDED COMPLAINT

POST OFFICE DEPARTMENT

OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20260

AUG 30 1963

Dr. Corliss Lamont
c/o Rabinowitz & Boudin
Attorneys at Law
30 E. 42nd Street
New York, New York 10017

Dear Dr. Lamont:

On August 13, 1963, civil action was filed in the Federal District Court of the Southern District of New York against the Postmaster General of the United States on behalf of an organization known as Basic Pamphlets, which, according to the complaint, is owned and managed by you.

This suit challenges the authority of the Postmaster General to detain mail addressed to Basic Pamphlets and challenges the Constitutionality of the legislation which authorized this detention.

It is the opinion of this office that this complaint constitutes an expression of desire by Basic Pamphlets and you as owner and manager to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda. Since 39 U.S.C. § 4008 states that ". . . detention shall not be required in the case of matter which is . . . otherwise ascertained by the Postmaster General to be desired by the addressee.", I have issued instructions to the postmaster at New York City and to the postmasters at all other foreign propaganda screening points that any mail presently being

detained be dispatched and that in the future mail addressed to Basic Pamphlets or to yourself not be detained.

Sincerely,

/s/ Adam G. Wenchel
Acting General Counsel

[fol. 7] Affidavit of Service (omitted in printing).

[fol. 8] [File endorsement omitted]
[Stamp—Memo. Endorsed].

In United States District Court

Southern District of New York

63 Civ. 2422

[Title omitted]

Notice of Motion for Summary Judgment and Other Relief—Filed December 3, 1963

Sir:

Please Take Notice, that upon the amended complaint herein, the affidavits of Corliss Lamont, sworn to November 28, 1963, the affidavit of Leonard B. Boudin, sworn to November 27, 1963, and the annexed statement in accordance with Rule 9(g) of the General Rules of this Court, the undersigned will move this Court at a motion part thereof, to be held at Room 506, United States District Courthouse, Foley Square, New York, New York, on the 10th day of December, 1963 for an order

1. Amending the designation of plaintiff in the caption of the summons and complaint herein to read "Corliss Lamont, doing business as Basic Pamphlets", pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

2. Granting plaintiff summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to judgment as a matter of law.

[fol. 9] Please Take Further Notice, that, at the same time and place, the undersigned, pursuant to Rule 25 of the General Rules of this Court, will suggest to the Court the necessity of convening a three-judge court in conformity with 28 U.S.C. §§ 2282 and 2284 for the reason that the plaintiff seeks to restrain the enforcement and execution of an Act of Congress, namely Public Law 87-793, § 305(a), October 11, 1962, 76 Stat. 840, 39 U.S.C. § 4008, for repugnance to the Constitution of the United States, and that the undersigned accordingly will move for an order convening such a three-judge court for the consideration of the motion for summary judgment.

Dated: New York, New York, November 29, 1963.

Rabinowitz & Boudin, by Leonard B. Boudin, Attorneys for Plaintiff.

To: Robert M. Morgenthau, United States Attorney, Attorney for Defendant, Southern District of New York, United States Courthouse, Foley Square, New York, New York.

[fol. 10]

ATTACHMENT TO NOTICE

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

[Title omitted]

STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES

Plaintiff contends that there is no genuine issue to be tried with respect to the following material facts:

1. Plaintiff is engaged in the business of publishing and distributing pamphlets and other literature on subjects of public interest, such as civil liberties, foreign relations, philosophy, and war and peace.

2. Defendant, acting pursuant to 39 U.S.C. §4008, has detained mail addressed to plaintiff on the ground that the Secretary of the Treasury had determined it to be "Communist political propaganda" and notified plaintiff that such mail would not be delivered except upon the request of plaintiff.

3. Plaintiff has never requested defendant to deliver mail addressed to plaintiff which has been determined to [fol. 11] be "Communist political propaganda" pursuant to 39 U.S.C. §4008.

4. The United States Government maintains several "foreign propaganda screening units" at which all unsealed mail from foreign countries is examined to determine whether it is "Communist political propaganda", and to separate from such mail that addressed to persons exempt from the requirements of 39 U.S.C. §4008 and to persons who have requested that such mail be delivered to them.

5. Such foreign propaganda screening units each maintain lists and records of persons desiring to receive "Communist political propaganda".

6. On or about August 30, 1963, after the commencement of this action, defendant, by his acting general counsel, advised plaintiff by letter that he deemed plaintiff to have requested the receipt of "Communist political propaganda" by virtue of plaintiff's instituting this action.

7. Defendant has notified and advised each foreign propaganda screening unit to include plaintiff in its lists or records of persons desiring to receive "Communist political propaganda".

Rabinowitz & Boudin, By Leonard B. Boudin, Attorneys for Plaintiff.

[fol. 12]

ATTACHMENT TO NOTICE

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

[Title omitted]

State of New York,
County of New York, ss.:

CORLISS LAMONT, being duly sworn, deposes and says:

1. I am the plaintiff herein, and submit this affidavit in support of an application to convene a three-judge court and for summary judgment.

2. This action has been commenced to enjoin the enforcement of a federal statute, 39 U.S.C. 4008 (hereinafter called "the statute"), on the ground that it violates the United States Constitution. The statute requires the defendant to detain "mailed matter except sealed letters" determined to be "Communist political propaganda", and to advise the addressee that it will be delivered only upon the addressee's request.

3. I am advised, and believe, that the defendant, with the cooperation of other government departments, has set up several "foreign propaganda screening units" in the United States to examine all unsealed mail entering the country. One of the functions of such units is to determine whether mail, otherwise detainable as "Communist political propaganda", should be nevertheless delivered to the addressees because the addressees have requested the same or [fol. 13] are entitled to it as being within the statutory exemptions to the procedure.

4. In order to accomplish the screening task, it is inherently necessary that each screening unit maintain a record of the names of all persons who have requested that they receive matter deemed by the Secretary of the Treasury to be "Communist political propaganda". It is clear

that such records are not only kept, but that the names contained therein are systematically delivered to other government agencies and congressional committees.

5. As the proprietor of the enterprise Basic Pamphlets, I publish and distribute pamphlets and other literature on subjects of public interest. These include such matters as civil liberties, foreign relations, war and peace and similar matter of immediate concern to well informed citizens. In order to do this effectively, it is necessary for me to have access to publications from throughout the world. Many such publications express views and opinions, as well as facts, not otherwise available in the United States, and knowledge of them enables me to publish with a background and perspective I would otherwise lack.

6. I receive many unsolicited publications in the mail, some of which I find of no use in my work. Others, however, contain information which in one way or another is useful to me. Whether a publication is useful to me, or even worth reading, is a decision I can only make for myself.

7. Shortly after July 8, 1963, I received a notice from the Post Office Department, San Francisco, California, on POD Form 2153-x. The notice, a copy of which is annexed hereto as Exhibit 1 and made a part hereof, stated that the Post Office was holding mail described as "Peking Review [fol. 14] #12, 1963, 1 copy" addressed to plaintiff, that said mail had been determined to be "Communist political propaganda" and could not be delivered unless I returned the notice by July 29, 1963 after indicating thereon my express desire to receive it.

8. I did not return the notice or otherwise indicate that plaintiff desired to receive such mail, and instead instructed my attorneys to commence this action. I am advised that the original complaint was filed August 13, 1963.

9. In a letter dated August 30, 1963 from the Acting General Counsel of the Post Office Department (a copy of which is annexed to the amended complaint as Exhibit A), I was advised that the complaint constituted "an expression of desire by Basic Pamphlets * * * to receive all * * * mail whether or not the Customs Bureau of the Treasury De-

partment considers it to be Communist political propaganda". The letter ended with a statement that the writer had instructed postmasters at all foreign propaganda screening points not to detain mail addressed to Basic Pamphlets or myself.

10. The last statement can only mean that my name and that of Basic Pamphlets has been placed on lists or records maintained by defendant, setting forth the names of persons who desire to receive Communist political propaganda. In the political situation which obtains at this time, such a classification carries with it a derogatory stigma. In the minds of persons into whose hands such lists come, there is inevitably an inference that persons who express a desire to receive "Communist political propaganda" are adherents of unpopular, if not unpatriotic and subversive, views.

[fol. 15] 11. The lists and records maintained by defendant are apparently not confidential, and the statute does not require that they be. The lists and records are necessarily circulated not only among postmasters at the screening units, but also to other government departments which participate in enforcing the statute. There is every reason to believe that the records are made available to other governmental agencies and congressional committees.

12. It is self-evident that mail containing expressions of political views is protected by the First Amendment to the United States Constitution. It necessarily follows, I believe, that a citizen cannot be required to place himself on a list—in effect, to register—as a condition to receiving such protected matter through the mails.

13. The implication is clear that the defendant, by deeming the institution of this action to be a request for the mailed matter, is seeking to moot the constitutional issue. I am advised that the United States Attorney has indicated that if this action is not voluntarily discontinued, he will move to dismiss the complaint. This was expressed in a letter to my attorneys dated September 13, 1963, a copy of which is annexed hereto as Exhibit 2 and made a part hereof.

14. I am advised that the defendant has sought similarly to moot two actions presently pending in District Courts in California which also are seeking to enjoin enforcement of the statute. Those actions are:

[fol. 16]

Leif Heilberg et ano. v. *John F. Fixa et al.*, United States District Court, Northern District of California, Southern Division, No. 41660.

Charles Amlin v. *Leslie N. Shaw et al.*, United States District Court, Southern District of California, Central Division, No. 63-635 PH.

15. I am advised that a motion to dismiss the *Heilberg* action as moot was denied, and that a similar motion in the *Amlin* action is pending.

WHEREFORE, deponent respectfully prays for the convening of a three-judge court and for an order granting summary judgment to plaintiff.

/s/ CORLISS LAMONT

Sworn to before me this
28th day of November, 1963.

/s/ HENRY WINESTINE
Henry Winestine
Notary Public, State of New York
No. 31-9702950
Qualified in New York County
Commission Expires March 30, 1964

INSTRUCTIONS

2362

July 23, 1963
(Date)

Deliver	Do not deliver
☐ This Publication	☐ This Publication
☐ Similar Publication	☐ Similar Publication

Peking Review # 12, 1963, 1 copy

Basic Pamphlets,
Dept. T, Box 42,
Cathedral Station,
New York 25, N. Y.

POD Form 2153-X, Jan. 1963

(Detach here)

MESSAGE TO ADDRESSEE

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-793, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

Postmaster

[fol. 17]

EXHIBIT 1 TO AFFIDAVIT

[fol. 18] EXHIBIT 2 TO AFFIDAVIT

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK

United States Courthouse
Foley Square
New York 7, N. Y.
10007

dww

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

ERA
34264

September 13, 1963

Rabinowitz & Boudin, Esqs.
30 East 42nd Street
New York 17, N. Y.

Re: Basic Pamphlets v. The Postmaster General of the United States—63 Civ. 2422

Dear Sirs:

We have been informed that Dr. Lamont was advised by the Acting General Counsel of the Post Office Department, by letter dated August 30, 1963, that instructions have been given "that any mail presently being detained be dispatched and that in the future mail addressed to Basic Pamphlets or to yourself not be detained."

In view of this, we consider the matter to be moot and respectfully suggest that you dismiss the action pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, thereby avoiding any costs.

Very truly yours,

ROBERT M. MORGENTHAU,
United States Attorney

By /s/ EUGENE R. ANDERSON
Eugene R. Anderson,
Chief, Civil Division

[fol. 19]

ATTACHMENT TO NOTICE

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

[Title omitted]

State of New York,
County of New York, ss.:

LEONARD B. BOUDIN, being duly sworn, deposes and says:

1. I am a member of the firm of Rabinowitz & Boudin, attorneys for the plaintiff herein and submit this affidavit in support of that part of plaintiff's instant motion seeking to correct the plaintiff's name in the caption of this action, pursuant to Rule 60(a) F.R.C.P.

2. When this action was commenced, I understood Basic Pamphlets to be an unincorporated association, and pursuant to Rule 17(b), F.R.C.P. caused the papers to be prepared with Basic Pamphlets named as plaintiff. I have subsequently learned that Basic Pamphlets is the trade name of Dr. Corliss Lamont, and that there is a duly filed certificate of doing business establishing that fact in the office of the New York County Clerk.

3. It is therefore appropriate to change the designation of the plaintiff herein to "Corliss Lamont, doing business as Basic Pamphlets", simply to reflect the actual situation.

[fol. 20] WHEREFORE, deponent respectfully prays for an order correcting the caption of the summons and complaint herein to designate the plaintiff as "Corliss Lamont, doing business as Basic Pamphlets".

/s/ LEONARD B. BOUDIN
Leonard B. Boudin

Sworn to before me this
27 day of November, 1964.

/s/ HENRY WINESTINE
Henry Winestine
Notary Public, State of New York
No. 31-9702950
Qualified in New York County
Commission Expires March 30, 1964

[fol. 21]

CLERK'S NOTE

Amended complaint and attachment are omitted from the record here. They appear at side folio 1, printed page 1, *supra*.

[fol. 22] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

[Title omitted]

AFFIDAVIT IN OPPOSITION—Filed December 20, 1963

[fol. 23]

TYLER, ASSOCIATE GENERAL COUNSEL

POST OFFICE DEPARTMENT

I, Tyler Abell, do hereby swear to the following facts:

1. The administration of §305 of Public Law 87-793 was under my control during the first part of 1963 when I held the position of Special Assistant to the Postmaster General. In this capacity I arranged for the establishment of all the now existing Foreign Propaganda Units, and gave oral, as well as written, instructions to the Foreign Propaganda Units.

2. One of the points covered in the establishment of each Propaganda Unit was an instruction that the file kept on addressees to whom propaganda had been sent would not be made public and that no part of this file could be released to any person, U. S. government agency or other group, except with express permission from Post Office Department headquarters in Washington.

3. Although my position changed from that of Special Assistant to the Postmaster General to Associate General Counsel in May, 1963, I have continued to oversee the Communist propaganda program. There have been no

requests from any of the field offices for permission to release the above-mentioned files, nor have any instructions been given from Washington.

Tyler Abell, Associate General Counsel.

United States of America,
District of Columbia, ss.

Sworn to before me this 13th day of December, 1963.

Lawrence B. Gowen, My Commission expires April 30, 1966.

[fol. 24] Affidavit of Mailing (omitted in printing).

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

BASIC PAMPHLETS

v.

THE POSTMASTER-GENERAL OF THE UNITED STATES.

ORDER GRANTING MOTION TO CONVENE THREE-JUDGE COURT, ETC.—December 31, 1963

Plaintiff moves preliminarily for the convening of a three-judge court, and defendant moves to dismiss. Upon the entire record it appears that the statutory standards for convening a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284 are met, and that the arguments of defendant in support of its motion to dismiss should be presented to the three-judge court. See *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); *Fried* v. *United States*, 212 F. Supp. 886, 896 (S.D.N.Y. 1963).

Accordingly, the motion to convene the three-judge court is granted, and defendant's motion to dismiss is denied, without prejudice to renewal thereof before the three-judge court.

Dated: New York, N. Y.

Wilfred Feinberg, U.S.D.J.

[fol. 26] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

CORLISS LAMONT d/b/a BASIC PAMPHLETS, Plaintiff,

v.

THE POSTMASTER GENERAL OF THE UNITED STATES, Defendant.

Argued March 10, 1964

Leonard B. Boudin of Rabinowitz & Boudin, New York, N.Y. *for plaintiff*.

Robert M. Morgenthau, United States Attorney, Southern District of New York (Anthony J. D'Auria, Asst. United States Attorney on the brief), *for defendant*.

Before: Hays, Circuit Judge, Levet and Feinberg, District Judges.

OPINION—May 5, 1964

Action to enjoin the enforcement of 39 U.S.C. §4008 (Supp. IV 1959-62), for an order declaring §4008 unconstitutional and that plaintiff is entitled to receive the mail referred to in that Section without complying with the pro-

cedure prescribed therein, and for an order directing the defendant to remove plaintiff's name from all lists and records he maintains of persons desiring to receive "communist political propaganda" and not to replace plaintiff's name upon such a list. Motion by plaintiff for summary judgment and cross-motion to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of [fol. 27] Civil Procedure. Defendant's motion to dismiss the complaint granted and plaintiff's motion for summary judgment denied.

Hays, Circuit Judge:

This action challenges the constitutionality of 39 U.S.C. § 4008 (Supp. IV 1959-62), added by Pub. L. 87-793, § 305(a), Oct. 11, 1962, 76 Stat. 840, which establishes a screening program for communist political propaganda originating abroad and deposited in the United States mails as unsealed mail matter. As plaintiff has requested an injunction restraining the enforcement of an Act of Congress, this court was convened pursuant to 28 U.S.C. §§ 2282, 2284, (1958).[1] Plaintiff has moved for summary judgment and defendant has cross-moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(1) and (6). We conclude that the plaintiff's motion should be denied and that the complaint must be dismissed.

Section 4008 requires the Postmaster General to detain all unsealed mail matter originating abroad and found to be "communist political propaganda," unless such material has been furnished pursuant to a subscription, or the addressee (upon being notified of the detention) requests delivery, or the Postmaster General otherwise ascertains the addressee's desire to receive the detained matter.[2] There are exceptions which include mail addressed to federal agencies, public libraries, educational institutions, and their officials and mail governed by a cultural exchange [fol. 28] agreement. To implement Section 4008 the Post Office Department and the Customs Bureau maintain eleven

screening points for the interception of communist political propaganda originating abroad. When it is determined that particular mail matter is communist political propaganda a notice (POD Form 2153-X) is sent to the addressee identifying the material being detained and advising the addressee that it will be destroyed within 20 days unless delivery is requested. Part of the form is a reply card on which the addressee may instruct the Post Office whether or not he wants the publication listed and similar publications delivered in the future. A list is kept of those requesting delivery of such material so that thereafter their mail will not be detained.

The facts are undisputed. Plaintiff, Corliss Lamont, is engaged in publishing and distributing pamphlets and other literature. He frequently receives both solicited and unsolicited mail from all over the world. In July 1963 Lamont was notified by the Post Office Department in San Francisco of the detention of communist political propaganda. Lamont did not reply to the notice. Instead he commenced this action to enjoin the enforcement of the statute. He alleges that Section 4008 infringes his first amendment right to freedom of speech and press and violates the due process clause of the fifth amendment by creating arbitrary and unreasonable classfications.[3]

[fol. 29] Shortly after Lamont commenced his action the Acting General Counsel of the Post Office Department wrote to him advising him that the Postmaster General considered the filing of the complaint to constitute an expression of Lamont's desire to receive communist political propaganda mail matter and that, Lamont's wishes having thus been ascertained, his mail would not be detained in the future. Lamont thereupon amended his complaint to request an order directing that his name be removed from any list or record maintained by defendant of persons desiring to receive communist political propaganda. The amended complaint asserted that maintenance of such a list, with the inherent possibility of public disclosure, violated Lamont's first and fifth amendment rights.

Keeping in mind "the long-established principle that 'we ought not to pass on questions of constitutionality . . .

unless such adjudication is unavoidable,'" *Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963), we proceed to an examination of defendant's claim first, that the dispute is moot since the Postmaster General has ordered that Lamont's mail not be detained in the future, and second, that Lamont has made no sufficient showing of a threat of injury by reason of the listing of his name.

1. *Mootness*

Lamont's first claim rests on the assertion that his freedom to read, a freedom he finds in the first amendment guaranty of freedom of speech and press, is infringed by the deterrent effect of the requirement that he request [fol. 30] delivery of communist political propaganda. But that requirement is no longer applicable to him since defendant has ordered the unimpeded delivery of plaintiff's mail. And, setting aside for the moment his objection to being included in defendant's list, Lamont does not contend that his rights are being violated by the statute as presently applied.

When the relief sought, here the unimpeded delivery of mail, is obtained in some other manner prior to final judicial disposition, the controversy becomes moot and the court ceases to have jurisdiction. *Taylor* v. *McElroy*, 360 U.S. 709 (1959); *Atherton Mills* v. *Johnston*, 259 U.S. 13 (1922). The same principle applies even when challenged governmental action continues to affect the complainant if no objection is raised to the changed manner of its incidence. *Natural Milk Ass'n* v. *San Francisco*, 317 U.S. 423 (1943). See generally Diamond, Federal Jurisdiction To Decide Moot Cases, 94 Pa. L. Rev. 125, 133-35 (1946).

Lamont argues that a defendant cannot moot a controversy in which the public interest is involved by the expedient of ceasing to apply a statute once a court challenge has been instituted. He contends that the Government has attempted to render this action moot as part of a policy of avoiding an adjudication of the statute's validity, that the persons whose freedom is most curtailed by the statute are those too timorous to protest, and that there is consequently a public interest in permitting plain-

tiff to continue his action so as to obtain an adjudication on behalf of these other persons.

[fol. 31] The cases upon which Lamont relies, e.g., *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953), *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 516 (1911), do not support his thesis. The public interest involved in those cases was that of enforcement by the Government of a regulatory statute. The cases hold that voluntary cessation of allegedly illegal conduct will not render the cause moot where the defendant is able at any time to recommence the illegal conduct. If there is no likelihood of a return to the old ways, the controversy will be moot even though the public interest is involved.

> "The defendant is free to return to his old ways. This, *together with* a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.
>
> *The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'*"

United States v. *W.T. Grant Co.*, supra at 632-33. (Footnotes omitted; emphasis added).

It is not contended here that the Postmaster General is likely to resume detention of Lamont's mail. Nor could it be. This is not a case where abandonment by a defendant of a prior course of conduct is to be explained by a change in attitude which may prove transient. Here the Postmaster General's actions have at all times been consistent with the mandate of the statute. The statute has been enforced both [fol. 32] before and after the initiation of this action. Lamont, by his own move, has changed the manner of enforcement as to him.

Moreover Lamont does not seek here to enforce a regulatory statute. He asked us to hold a statute invalid under

the constitution. We know of no instance where the Supreme Court in rejecting a claim of mootness has announced a "public interest" in the adjudication of a constitutional issue. Our tradition of judicial reluctance to decide constitutional questions in advance of strictest necessity, see *Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)—and particularly the line of decisions holding that a litigant who invokes the power to annul legislation on grounds of its unconstitutionality "must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement," *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923); see *Poe* v. *Ullman*, 367 U.S. 497, 502-09 (1961) (opinion of Frankfurter, J.); *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 70-81 (1961); Comment, Threat of Enforcement—Prerequisite of a Justiciable Controversy, 62 Colum. L. Rev. 106 (1962)—dictates the conclusion that in cases such as this the public interest requires an exacting application of the standards governing mootness claims. See *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 184 (1948).

Lamont's suggestion that he be permitted to represent the interests of nonparties subject to the statute does not [fol. 33] affect our analysis of the public interest as it relates to the mootness of Lamont's first claim. Although it not infrequently happens that a p[illegible]ty to constitutional litigation is representative of a class (e.g., taxpayers, parents), a determination of mootness will nevertheless be made on the basis of the factual circumstances applicable to the party himself, not to the class. See *Doremus* v. *Board of Educ.*, 342 U.S. 429, 432 (1952). We postpone until after our discussion of the problem posed by the second part of Lamont's complaint, consideration of his contention that, despite the absence of any controversy between him and the Postmaster General, he should nevertheless be permitted to sue as the representative of others similarly situated.

2. *Timeliness of the Second Claim.*

Lamont requests an order directing that defendant remove his name from lists and records of persons desiring to receive communist political propaganda.

Viewed separately, this part of the complaint does not state an actual controversy, for there is no allegation that Lamont has demanded the requested relief from the defendant or that it has or would be refused. But of course this issue cannot be so simply resolved, since defendant's acquiescence in such a demand would subject Lamont's mail to renewed detention thus reviving that aspect of the controversy. In substance, then, the complaint must be regarded not as asserting two separate claims, but as stating a single claim with alternative allegations of injury. Either plaintiff's mail is detained *or* he is listed as a person desir- [fol. 34] ing to receive communist political propaganda. We held above that the controversy was moot insofar as it rested on an allegation of injury stemming from detention of plaintiff's mail. We now consider Lamont's contention that inclusion in a list of persons desiring to receive communist political propaganda is a sufficient showing of injury to permit him to challenge the statute as a whole.

Lamont maintains that he is injured in two respects: (1) that the mere fact of inclusion in a list circulated to Post Office personnel infringes his right of anonymity, and (2) that the list will be distributed to other government agencies, including Congressional investigating committees, and eventually to the general public. Both effects are said to deter him from the free exercise of his rights of speech and association.

The statute makes no provision whatsoever for keeping any list or record of persons desiring to receive communist political propaganda. Lamont assumes, presumably correctly, that such a list is kept since the agents of the Postmaster General would not otherwise be able to ascertain what persons are to get the mail in the regular course. But if any injury results from the keeping of such a list it is an injury which is purely incidental to the statutory scheme and one which appears to be wholly unintended.

It is not sufficient for a litigant merely to assert that particular government action or the threat of such action deters him from the exercise of some constitutional right. The claimed deterrent effect must be grounded in a realistic [fol. 35] appraisal of the impact of the action being challenged. *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.). And when the claim of injury is based upon the prospect of future action, the threat of such action must be imminent and not hypothetical or imagined. *Poe* v. *Ullman*, supra; *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 71-81 (1961).

Thus, in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951), cited by Lamont, the complainants alleged both that they had been falsely classified as communist organizations and that such classification had resulted in substantial economic injury. 341 U.S. at 137, 158-59. Though these allegations, which were deemed admitted by the Attorney General, were held to establish the existence of a justiciable controversy, the Court treated the question of justiciability as a problem of substantial difficulty.

By contrast Lamont does not indicate that the present circulation of the list to government personnel or any future distribution that may occur will result in any material injury, such as loss of customers or social ostracism. Lamont does contend, in a conclusionary fashion, that future public disclosure of the list would lead to public opprobrium. It is not immediately apparent why this should be so. Classification as a person desiring to receive communist political propaganda—as distinguished from, for example, classification as a "communist front organization"—need not connote disapprobation. Indeed, the statutory exception for public libraries and for educational in- [fol. 36] stitutions and their officials, evidences Congressional recognition that reputable organizations and individuals may receive communist political propaganda without any disgrace attaching.

In any event, the threat of general distribution of the list is largely speculative. Lamont cites statements in Congressional hearings indicating that under the previous foreign propaganda screening program it was the practice of the Post Office to disclose to Congressional committees the

names of recipients of communist propaganda. See Hearings before the House Committee on Un-American Activities, 85th Cong., 2d Sess., Sept. 3, 4 and 5, 1958, at p. 2794; cf. Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, etc., of the Senate Committee of the Judiciary, 87th Cong., 1st Sess., Mar. 26, 1959 and April 3, 1961, at p. 56 (bulk shipments to distributors). But that program, which was initiated without specific statutory authorization and was discontinued by Executive Order on March 17, 1961, nineteen months before enactment of the present statute, differed in several important respects from the present program. See generally, Schwartz and Paul, Foreign Communist Propaganda in the Mails: A report on Some Problems of Federal Censorship, 107 U. Pa. L. Rev. 621, 633-49 (1959). In view of the change in administration and the material differences between the two programs, which may well be taken to manifest a basic change in administrative philosophy, we would not be disposed to lightly assume that administrative policy regarding disclosure of lists of recipients of communist propaganda has remained constant. [fol. 37] In support of the conclusion that administrative policy has indeed changed the Government submits an affidavit by Tyler Abell, Associate General Counsel to the Post Office Department, which states that the list kept of addressees to whom communist propaganda will be sent without detention will not be made public and that instructions have been issued prohibiting any part of the list from being released to any person, United States Government agency or other group without the express permission of the Post Office Department. As Lamont points out, this affidavit does not establish conclusively that disclosure will not occur, since it does not specify under what circumstances permission might be given for the list's release. But it does evidence a solicitous regard for the confidentiality of this information, and we think that on the whole this affidavit suffices to deprive the prior administrative practice cited by Lamont of whatever probative value it may have had. In this posture of the case, we can only conclude that public disclosure is only an abstract possibility, not an immediate threat.

We hold that present circulation of the list to Post Office personnel does not constitute such a legal injury as will permit plaintiff to maintain this suit, and that the threat of future public distribution of the list is not sufficiently imminent to present a controversy ripe for adjudication.

[fol. 38]

3. Standing to assert the rights of third parties.

Lamont contends that even if this court should find that there is no justiciable controversy between him and the Postmaster General, he should nevertheless be permitted to continue this action "in order to vindicate the rights of the many persons who are not willing or able to sue but who, like the plaintiff, have been and will be injured by this enforcement of the statute." Lamont asserts that the Government's policy for administering this statute is deliberately designed to insulate it from judicial scrutiny, and that the rights of numerous individuals who are unwilling to bring suit or request delivery of detained mail matter are being abridged and will continue to be abridged if this action is dismissed. That assertion is neither admitted nor denied by the Government in this case.[5]

As a general rule litigants may not invoke the rights of parties not before the court.

> "Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have a standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

Perkins v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940); accord, *Tileston* v. *Ullman*, 318 U.S. 44 (1943) (fourteenth amendment claim). Although numerous exceptions have been made to the doctrine that a litigant may not assert the rights of third parties, see, e.g., *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958) (right of anonymity may be asserted [fol. 39] by association on behalf of its members); *Pierce*

v. *Society of Sisters*, 268 U.S. 510, 534-36 (1925) (private school may assert rights of the parents of its pupils), in no case has such an exception been created when, as here, the litigant failed to demonstrate that he is, in his own right, an injured party. See Sedler, Standing To Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599, at 630 n. 129, 646 (1962). And in general there has been some pre-existing relationship between the complainant and the person whose rights he seeks to assert other than the fact that both are affected by the challenged statute. See Sedler, supra at 641-45, 647.

The present case does not fit within any of the established exceptions, and we hold that Lamont has no standing to invoke the rights of persons not parties to this action.

Defendant's motion to dismiss the complaint is granted, and plaintiff's motion for summary judgment is denied.

Settle order on notice.

Paul R. Hays.

[fol. 40]

[1] In Amlin v. Shaw, No. 63-635-PH, S.D. Cal., Feb. 13, 1964, a complaint challenging section 4008 was dismissed by a single judge, who held that it failed to present either a justiciable controversy or a substantial constitutional question. The complaint in the present case, however, was found by Judge Feinberg, to whom the case was originally assigned, to present a substantial question both on the merits and on the issue of jsuticiability. Accordingly, he requested the convocation of this court. See *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962). Defendant's renewed motion challenging the convocation of the three-judge court is denied.

[2] The statute, 39 U.S.C. 4008, reads as follows:

"§4008. Communist political propaganda

(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist' political propaganda', shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not

be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term 'communist political propaganda' means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

[fol. 41]

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not 'communist political propaganda' addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b)."

Section 1(j) of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. 611(j), whose definition of "Communist political propaganda" is incorporated in Section 4008 provides:

"(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. * * *"

[3] Lamont's complaint alleges that the statute is unconstitutional and void upon its face and as applied because:

[fol. 42]

"a. it violates plaintiff's right to freedom of speech and press as guaranteed by the First Amendment to the United States Constitution;

"b. it violates the due process clause of the Fifth Amendment to the United States Constitution in that it is vague, indefinite and uncertain and fails to provide adequate or any procedural safeguards for making the determination as to what is 'Communist political propaganda', assuming such a determination can ever be made;

"c. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit: persons desiring to receive Communist political propaganda, and impliedly stigmatizing members of that class and holding them up to opprobrium;

"d. it violates the due process clause of the Fifth Amendment to the United States Constitution by creating an arbitrary and unreasonable classification, to wit: officials of United States Government agencies, public libraries, colleges, universities, graduate schools and scientific or professional institutions for advanced studies, which class is exempt from the provision of the statute, with the result that persons in the position of plaintiff are discriminated against."

[4] See note 2 supra.

[5] It should be noted, however, that a suit challenging section 4008 might be brought by a sender of detained material, e.g. a distributor of Russian books or magazines. Cf. amended complaint in *McReynolds* v. *Christenberry*, Civil No. 63-3648, S.D.N.Y., filed March 30, 1964. It would not appear that such a suit could be mooted by any administrative action, and it would equally serve to secure full protection of the rights of recipients. Indeed, past challenges to statutes regulating the use of the mails, have, almost without exception, been advanced by senders, whose interest is usually more direct than that of a recipient—at least when, as here, the mail matter involved is unsealed, unsolicited, mail. See, e.g., *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946); *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407 (1921).

[fol. 43]

LAMONT,

v.

POSTMASTER GENERAL.

I concur.

4/28/64 RHL

[fol. 44] FEINBERG, District Judge (dissenting)

As the majority opinion correctly points out, while Section 4008 does not specifically authorize the Post Office to maintain a list of persons desiring to receive communist political propaganda, such a list is essential to effective implementation of the statutory scheme. Plaintiff, therefore, is in a position to challenge the constitutionality of the statute, even though his mail will not be detained in the future, if he has suffered, or is imminently threatened with, a legal injury as a result of the presence of his name on the list. The majority concludes as a matter of law that public disclosure of the list "is only an abstract possibility, not an immediate threat." It refers to the prior Post Office practice of disclosing the names on such a list to Congressional committees, but relies upon an affidavit of the Associate General Counsel of the Post Office as depriving that prior practice cited by plaintiff "of whatever probative value it may have had." This conflict on a crucial point raises a genuine issue as to a material fact—likelihood of public disclosure of the list—requiring denial of the government's motion, whether it be treated as a motion to dismiss or as one for summary judgment. *Cf.* Rule 12(b), Fed. R. Civ. P.

[fol. 45] The majority also finds that ". . . Lamont does not indicate that the present circulation of the list to government personnel or any future distribution that may occur will result in any material injury, such as loss of customers or social ostracism," and concludes that "classification as a person desiring to receive communist political propaganda . . . need not connote disapprobation." It may

be doubted whether one asserting the justiciability of a constitutional right to anonymity need show more in the way of injury that a threat of public disclosure, *cf. Talley* v. *California*, 362 U.S. 60 (1960); *United States* v. *Rumely*, 345 U.S. 41, 57 (1953) (concurring opinion), or, perhaps, more than the limited disclosure to Post Office personnel concededly present here.[1] But, in any event, whether classification as a person desiring to receive communist political propaganda *need* connote public disapprobation is irrelevant, since it ordinarily does so connote, and social ostracism flows from this. *Cf. Grant* v. *Reader's Digest Ass'n*, 151 F.2d 733, 735 (2 Cir.), cert. denied, 326 U.S. 797 (1946).

Therefore, I dissent from the grant of the government's motion. In addition, were I to follow the lead of the majority in making a finding as to this issue on this record, I [fol. 46] would be inclined to conclude that there is a sufficient threat of injury to satisfy the requirement of "ripeness." This conclusion would be predicated largely on the irreparable nature of the threatened injury and the improbability of plaintiff having sufficient notice of public disclosure of the list to allow him to raise his constitutional objections before the injury is inflicted.

In addition, the majority opinion concedes that there are numerous exceptions to the doctrine that a litigant may not assert the constitutional rights of third parties. It concludes that this case is not appropriate for invoking one of the exceptions because plaintiff has failed to demonstrate that he is, in his own right, an injured party. However, if the conclusion as to ripeness with regard to the list is incorrect (as I think it is), then the rights of third parties who themselves might be afraid to bring suit are significant. Thus, one of the arguments advanced against Section 4008 is that the standard of "communist political propaganda" is so vague that it could include relatively inoffensive publications.[2] Yet, one who would make this argument in test-

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[1] *Cf.* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 139-41 (1941) (characterizing the listing challenged there as defamatory); RESTATEMENT, TORTS § 577 (publication rule in defamation cases).

[2] *Cf.* Douglas, *The Right of Association*, 63 Colum. L. Rev. 1361, 1372 (1963).

ing the constitutionality of Section 4008 must either announce an interest in communist political propaganda and invite social disapprobation or forego the mail affected by the Section. Allowing plaintiff in this suit to raise the rights of third parties would extricate them from this dilemma. Note, 77 Harv. L. Rev. 1165, 1170 (1964).

[fol. 47] There is another factor here which may not of itself furnish sufficient basis for denying the government's action but which warrants comment. This is one of several actions brought to test the constitutionality of Section 4008 by a recipient whose mail has been withheld. In each case, after the complaint had been served, the Postmaster General delivered such mail to the plaintiff and then asked the court to dismiss the action as moot.[3] With commendable candor, the government admits that this device, if approved by the courts, will prevent any potential recipient of such mail from testing the statute.[4] I doubt whether the doctrine of mootness or justiciability requires this result, *cf. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 331-36 (1961) (dissenting opinion), particularly where a First Amendment right is allegedly involved.

This dissent is not to be taken as expressing any opinion as to the constitutionality of Section 4008, since the majority opinion does not reach these issues, and it would, therefore, be inappropriate for me to do so.

May 5, 1964

Wilfred Feinberg, U. S. D. J.

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[3] In addition to the instant case, complaints were filed in the Northern District of California (*Heilberg* v. *Fixia*, No. 41660, N.D. Cal.) and the Southern District of California (*Amlin* v. *Shaw*, No. 63-635-PH, S.D. Cal.). It appears that the government's position in both cases was as stated in the text. See Transcript of hearing in the *Heilberg* case, dated October 24, 1963, p. 5; Judgment of Dismissal in the *Amlin* case, dated February 13, 1964, on the ground, *inter alia*, that there is no justiciable case or controversy.

[4] Transcript of oral argument, pp. 61-62.

[fol. 48] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 2422

[Title omitted]

NOTICE OF SETTLEMENT—Filed May 19, 1964

Sir:

Please Take Notice that the within Order will be presented for settlement and signature to the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Richard H. Levet, United States District Judge and the Honorable Wilfred Feinberg, United States District Judge, at the office of the Clerk, Room 601, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 18th day of May, 1964, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated: New York, New York, May 11, 1964.

Yours etc.,

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for Defendant.

To: Rabinowitz & Boudin, 30 East 42nd Street, New York, New York 10017, Attorneys for Plaintiff.

[fol. 49] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
63 Civ. 2422

CORLISS LAMONT d/b/a BASIC PAMPHLETS, Plaintiff,

—v.—

THE POSTMASTER GENERAL OF THE UNITED STATES, Defendant.

ORDER AND JUDGMENT—May 19, 1964

The complaint herein having been filed on August 13, 1963 and the amended complaint having been filed on December 3, 1963 and the plaintiff having made application to this Court (Wilfred Feinberg, United States District Judge, sitting) for the convocation of a three-judge court and the defendant having opposed said application and having moved to dismiss the amended complaint and Judge Feinberg having granted plaintiff's application and having denied defendant's motion and a three-judge court having been convened consisting of Paul R. Hays, U.S.C.J.; Richard H. Levet, U.S.D.J.; and Wilfred Feinberg, U.S.D.J. and the plaintiff having moved before the three-judge court (a) for summary judgment, (b) to amend the caption to read as set forth above and (3) to have the matter proceed and be decided upon the amended complaint and the defendant having consented to amending the caption and to proceeding upon the amended complaint and the defendant having moved before the three-judge court to dismiss the amended complaint and having renewed the objection to the convocation of the three-judge court and the matter having come on to be heard before [fol. 50] the three-judge court and the court having filed its written opinions, it is hereby,

Ordered, Adjudged and Decreed, that the plaintiff's motion for summary judgment be and the same hereby is denied, and it is further,

Ordered, Adjudged and Decreed, that the caption of this matter be and the same hereby is amended to read as set forth above, and it is further,

Ordered, Adjudged and Decreed, that this matter proceed and be decided upon the amended complaint, and it is further,

Ordered, Adjudged and Decreed, that the amended complaint be and the same hereby is dismissed with prejudice, and it is further,

Ordered, Adjudged and Decreed, that the defendant's objection to the convocation of the three-judge court be and the same hereby is overruled.

Dated: New York, New York, May 19th, 1964.

Paul R. Hays, U. S. C. J.
Richard H. Levet, U. S. D. J.

I dissent from so much of the foregoing order as grants defendant's motion to dismiss the amended complaint and in view of the action of the majority do not reach the plaintiff's motion for summary judgment.

Wilfred Feinberg, U. S. D. J.

Dated: May 19, 1964.

Judgment Entered, 5/19/64, James E. Valeche, Clerk.

[fol. 51] Affidavit of Mailing (omitted in printing).

[fol. 52] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. 63 Civ. 2422

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 17, 1964

I. Notice is hereby given that Corliss Lamont, doing business as Basic Pamphlets, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the judgment denying plaintiff's motion for summary judgment and for a permanent injunction, and granting defendant's motion to dismiss the amended complaint with prejudice, which judgment was entered on May 19, 1964.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. This notice of appeal.
2. The order and judgment entered May 19, 1964.
3. The opinions of the three-judge court dated May 5, 1964.
4. The amended complaint.
5. The notice of motion for summary judgment and other relief, dated November 29, 1963.
6. The statement pursuant to Rule 9(g) of the General Rules of the District Court for the Southern District of New York.

[fol. 53] 7. The affidavit of Corliss Lamont, sworn to November 28, 1963.

8. The affidavit of Leonard B. Boudin, sworn to November 27, 1963.

9. The affidavit of Tyler Abell, sworn to December 13, 1963.

III. The following questions are presented by this appeal:

1. Whether plaintiff's claim that 39 U.S.C. § 4008 is unconstitutional is moot.

2. Whether the defendant's detention of mail, and his maintenance of lists of persons, including plaintiff, who desire to receive "Communist political propaganda" through the mails, and the possibility of such lists being disclosed to other persons, constitute a violation of the constitutional rights of plaintiff.

3. Whether plaintiff has standing in this action to assert the unconstitutionality of 39 U.S.C. § 4008 on behalf of other persons affected by it.

4. Whether 39 U.S.C. § 4008 as written and applied herein is constitutional.

Dated: June 16, 1964.

Rabinowitz & Boudin, By Leonard B. Boudin, Member of the Firm, Attorneys for Plaintiff-Appellant.

[fol. 54] Proof of Service (omitted in printing).

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 491—October term, 1964

CORLISS LAMONT, doing business as BASIC PAMPHLETS,
Appellant,

—v.—

POSTMASTER GENERAL OF THE UNITED STATES.

Appeal from the United States District Court for the Southern District of New York.

ORDER NOTING PROBABLE JURISDICTION—December 7, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. Counsel are directed to discuss in their briefs and oral argument the question of mootness as well as the merits of the case.

Mr. Justice White took no part in the consideration or decision of this case.